

1 In summary, Taxpayers are personally, jointly and severally liable for the tax liability of
2 Prestige Towing & Recovery, Inc. by virtue of the fact that they continued to incur tax liability to
3 the Department after that corporation ceased to exist under New Mexico law.

4 IT IS DECIDED AND ORDERED AS FOLLOWS:

5 **FINDINGS OF FACT**

6 1. Mr. Gabriel Vigil grew up in Colorado, but relocated to Mora, New Mexico in
7 November of 1995 at the approximate age of 21. **[Direct Examination of Mr. Gabriel Vigil]**

8 2. Mr. Elauterio Vigil is Mr. Gabriel Vigil’s father. **[Direct Examination of Ms.**
9 **Lori Vigil; Direct Examination of Mr. Gabriel Vigil; Direct Examination of Mr. Elauterio**
10 **Vigil]**

11 3. Mr. Gabriel Vigil is trained as an automotive technician and was employed in that
12 capacity until 1997 when he decided to establish his own business, Prestige Towing & Recovery,
13 Inc. **[Direct Examination of Mr. Gabriel Vigil]**

14 4. On October 24, 1997, the Office of the State Corporation Commission issued a
15 Certificate of Incorporation of Prestige Towing & Recovery, Inc. (hereinafter “Prestige 1997”).
16 **[Department Ex. B-002]**

17 5. The Articles of Incorporation establishing Prestige 1997 identified its initial board
18 of directors as Mr. Gabriel Vigil and his father, Mr. Elauterio Vigil, who were also identified as
19 incorporators. **[Department Ex. B-003 – B-004]**

20 6. The Articles of Incorporation establishing Prestige 1997 identified Mr. Gabriel
21 Vigil’s mailing address as P.O. Box 766, Mora, NM 87732. Mr. Elauterio Vigil’s address was in
22 Colorado, since that was the place of his residence and employment at that particular period of
23 time. **[Direct Examination of Mr. Elauterio Vigil; Department Ex. B-003 – B-004]**

1 7. In or about November of 1997, Prestige 1997 commenced conducting business in
2 New Mexico. **[Direct Examination of Mr. Gabriel Vigil]**

3 8. Since commencing business through Prestige 1997, Mr. Elauterio Vigil has
4 contributed approximately \$100,000 toward the business. Among his financial contributions
5 were a down payment of approximately \$10,000 toward Prestige 1997's first tow truck, financial
6 assistance in the approximate amount of \$18,000 to purchase and erect a shop building, and
7 financial assistance for the acquisition of various other pieces of shop equipment. **[Direct**
8 **Examination of Mr. Gabriel Vigil]**

9 9. Mr. Elauterio Vigil is also an electrician and plumber/pipe fitter by trade and has
10 experience in construction. He has utilized various skills acquired through his training and
11 experience to assist in the construction and maintenance of the shop facility, which as of the date
12 of the hearing, was approximately 10,000 square feet. **[Direct Examination of Mr. Gabriel**
13 **Vigil; Direct Examination of Mr. Elauterio Vigil]**

14 10. The primary reason for identifying Mr. Elauterio Vigil as a corporate officer and
15 incorporator for Prestige 1997 was to express respect and gratitude for his assistance. **[Direct**
16 **Examination of Ms. Lori Vigil]**

17 11. Mr. Elauterio Vigil, who is originally from Mora, New Mexico, resided in
18 Colorado until he retired in 2007. **[Direct Examination of Mr. Elauterio Vigil]**

19 12. Ms. Lori Vigil is married to Mr. Gabriel Vigil. They married in 1995. Mr.
20 Elauterio Vigil is her father-in-law. **[Direct Examination of Ms. Lori Vigil]**

21 13. During all relevant periods of time, Ms. Lori Vigil handled all administrative
22 tasks for Prestige 1997, while her spouse, Mr. Gabriel Vigil, handled all customer services.
23 **[Direct Examination of Ms. Lori Vigil]**

1 14. Ms. Vigil’s father was Mr. George Edwards. He was a certified public accountant
2 practicing in Colorado and assisted Ms. Vigil with various business tasks, including preparation
3 of Prestige 1997’s corporate filings. **[Direct Examination of Ms. Lori Vigil]**

4 15. On or before April 27, 2001, Taxpayers executed a financing statement for filing
5 pursuant to the Uniform Commercial Code. Mr. Elauterio Vigil signed the document as president
6 and Mr. Gabriel Vigil signed as vice-president of Prestige 1997. The statement incorporated by
7 reference an exhibit identifying various pieces equipment to be employed by Prestige 1997,
8 including a 1998 International Tow Truck. **[Department Ex. G]**

9 16. On March 30, 2004, Mr. Elauterio Vigil executed an Application for Vehicle Title
10 and Registration in which he identified the registered owner of the vehicle as “Vigil Elauterio &
11 Antonia[,] DBA Prestige Tow and Rec[.,] PO Box 766[,] Mora[,] NM 87732” His signature
12 appears below the certification in which he agreed that “the information given herein is true and
13 correct to the best of my (our) knowledge[.]”**[Department Ex. I]**

14 17. The vehicle subject of the Application for Vehicle Title and Registration executed
15 on March 30, 2004 was a trailer purchased in the name of “Elauterio & Antonia Vigil DBA
16 Prestige Towing & Recovery” from Dunlap’s Trailers of Colorado, located in Ft. Lupton,
17 Colorado. **[Department Ex. I]**

18 18. On June 24, 2004, Mr. Elauterio Vigil executed an Application for Vehicle Title
19 and Registration in which he identified the registered owner of the vehicle as “Vigil Elauterio &
20 Antonio[sic][,] DBA Prestige Tow and Rec[.,] PO Box 766[,] Mora[,] NM 87732” His signature
21 appears below the certification in which he agreed that “the information given herein is true and
22 correct to the best of my (our) knowledge[.]” **[Department Ex. H¹]**

¹ The Application for Vehicle Title and Registration identifies “Antonio” instead of “Antonia.” However, this appears to be a typographical error since other documents contained in the same exhibit refer to “Antonia.”

1 19. The vehicle subject of the Application for Vehicle Title and Registration executed
2 on June 24, 2004 was a trailer purchased in the name of “Elauterio & Antonia Vigil DBA
3 Prestige Towing & Recovery” from Dunlap’s Trailers of Colorado, located in Ft. Lupton,
4 Colorado. **[Department Ex. H]**

5 20. On March 15, 2007, Prestige 1997, by and through Ms. Vigil, submitted its
6 Domestic Profit Corporation Biennial Report for year ending December 31, 2004, with payment
7 for associated fees and penalties, which was subsequently received by the New Mexico Public
8 Regulation Commission, Corporations Bureau, on March 20, 2007. **[Direct Examination of Ms.
9 Lori Vigil; Taxpayer Ex. 10]**

10 21. On March 15, 2007, Prestige 1997, by and through Ms. Vigil, submitted its
11 Domestic Profit Corporation Biennial Report for year ending December 31, 2016, with payment
12 for associated fees, which was subsequently received by the New Mexico Public Regulation
13 Commission, Corporations Bureau, on March 20, 2007. **[Direct Examination of Ms. Lori Vigil;
14 Taxpayer Ex. 11]**

15 22. On April 5, 2007, the New Mexico Public Regulation Commission returned
16 Prestige 1997’s report and payment for tax year 2006. It made no reference to the report and
17 payment for tax year 2004. The letter identified the following items for correction. **[Direct
18 Examination of Ms. Vigil; Taxpayer Ex. 12]**

- 19 a. “Report must identify all directors[;]”
- 20 b. “Statutes require addresses for each of the officers or directors[;]” and
- 21 c. “Statutes require a Registered Agent that resides in New Mexico with a street
22 address or geographical location.”

1 23. Ms. Vigil recalled returning the 2006 report with corrections by facsimile. She did
2 not resubmit payment. Although she testified that the payment should have already been in
3 possession of the New Mexico Public Regulation Commission, correspondence dated April 5,
4 2007 indicated that “Returned is your 2006- FYE Corporate Report and Check number 6585[.]”

5 **[Direct Examination of Ms. Vigil; Taxpayer Ex. 12]**

6 24. Ms. Vigil did not receive any response from the PRC in reference to the 2006
7 report or its subsequent re-submission and could neither confirm nor recall whether any check
8 that accompanied the referenced biennial reports cleared the bank. **[Direct Examination of Ms.**

9 **Vigil]**

10 25. On August 7, 2007, Prestige 1997’s Certificate of Incorporation was revoked for
11 failure to file one or more mandatory corporate reports. **[Department Ex. B-007]**

12 26. The Certificate of Cancellation of Certificate of Incorporation of Prestige Towing
13 & Recovery, Inc. was issued by the Office of the Public Regulation Commission, successor to
14 the State Corporation Commission. **[Department Ex. B-007 – 008]**

15 27. The Certificate of Cancellation of Certificate of Incorporation of Prestige Towing
16 & Recovery, Inc. (hereinafter “Certificate of Cancellation”) was accompanied by a cover letter
17 of the same date displaying a mailing address of PO Box 766, Mora, NM 87732. **[Department**

18 **Ex. B-008]**

19 28. According to online information from the New Mexico Secretary of State, dated
20 March 20, 2018, Prestige 1997’s mailing address was “Highway 518, Mile Marker #33¾, Mora,
21 NM 87715[.]” Although that address represented Prestige 1997’s physical location, it never
22 received, nor was it capable of receiving mail, at that address. **[Direct Examination of Ms. Lori**

23 **Vigil; Taxpayer Ex. 4]**

1 29. Although online information from the New Mexico Secretary of State, as of
2 March 20, 2018, suggests that the mailing address on file was something other than PO Box 766,
3 Mora, NM 87732, that information fails to establish that in 2007, the Certificate of Cancellation
4 was mailed to an address other than the address appearing on the cover letter accompanying the
5 Certificate of Cancellation. **[Department Ex. B-007 – B-008; Taxpayer Ex. 4]**

6 30. On or about April 2, 2008, Ms. Vigil signed a 2007 PTE (New Mexico Income
7 Information Return for Pass-Through Entities) for Prestige 1997, P.O. Box 766, Mora, NM
8 87732 **[Direct Examination of Ms. Lori Vigil; Department Ex. D-001 – D-006]**

9 31. During the same period of time, Ms. Vigil was devoting substantial amounts of
10 time in Colorado to assist in caring for her terminally ill father. Mr. Edwards was diagnosed with
11 cancer in mid-2007 and subsequently died in October of 2008. **[Direct Examination of Ms.
12 Lori Vigil]**

13 32. During the same period of time, Mr. and Ms. Vigil were similarly devoting
14 significant amounts of time and energy to the care of their 4-year-old son who was also suffering
15 from various complications associated with having been born prematurely. **[Direct Examination
16 of Ms. Lori Vigil]**

17 33. During the same period of time, Mr. and Ms. Vigil were also devoting significant
18 amounts of time and energy to the care of their teenage daughter who was displaying serious
19 medical symptoms of an unknown origin, beginning in approximately November of 2008. After
20 several years, in or about December of 2011, her dentist determined that her symptoms had
21 derived from an allergic reaction to a substance contained in her dental braces. **[Direct
22 Examination of Ms. Lori Vigil]**

1 34. The circumstances of Mr. Edwards’ illness and subsequent death, as well as the
2 commitment to care for their own children who were also having severe health problems, had the
3 unintended consequence of diverting attention away from various business responsibilities.

4 **[Direct Examination of Ms. Lori Vigil]**

5 35. Circumstances eventually permitted Mr. Vigil and Ms. Vigil to dedicate more
6 time to the needs of their business, at which time they acquired the assistance of individuals to
7 assist them in getting their various business filings and reports up to date. **[Direct Examination**
8 **of Ms. Lori Vigil]**

9 36. On or about April 16, 2011, Mr. Gabriel Vigil signed a 2008 PTE (New Mexico
10 Income Information Return for Pass-Through Entities) for Prestige 1997, P.O. Box 766, Mora,
11 NM 87732. **[Direct Examination of Ms. Lori Vigil; Department Ex. D-007 – D-009]**

12 37. On or about April 16, 2011, Prestige 1997 issued separate Schedules K-1 to Mr.
13 Elauterio Vigil (identified as “Shareholder #1) and Mr. Gabriel Vigil (identified as “Shareholder
14 #2), for tax year 2008. **[Direct Examination of Ms. Lori Vigil; Department Ex. D-010 – D-**
15 **013]**

16 38. The reported distribution to Mr. Elauterio Vigil was a loss of \$51,878
17 representing a distribution percentage of 80 percent. The reported distribution to Mr. Gabriel
18 Vigil was a loss of \$12,970 representing a distribution percentage of 20 percent. The sum of the
19 reported losses correspond with the total loss reported in the corresponding 2008 PTE-1 (Line 1
20 – 12). **[Department Ex. D-007 – D-013]**

21 39. Within proximity prior to September 21, 2011, Ms. Vigil was notified by a
22 financial institution that Prestige 1997’s Certificate of Incorporation had been revoked. The

1 revocation was noted as part of a routine review of Prestige 1997's financial records. **[Direct**
2 **Examination of Ms. Lori Vigil]**

3 40. Ms. Vigil contacted the PRC by telephone at which time someone at the PRC
4 allegedly suggested that Ms. Vigil establish a new corporation having the same name as the
5 previous corporation, Prestige Towing & Recovery, Inc. **[Direct Examination of Ms. Vigil]**

6 41. Mr. Gabriel Vigil concurred that re-incorporating Prestige Towing & Recovery,
7 Inc. represented the most efficient means of resolving the revocation of Prestige 1997's
8 Certificate of Incorporation. **[Direct Examination of Ms. Lori Vigil; Taxpayer Ex. 6;**
9 **Department Ex. C]**

10 42. On September 21, 2011, the New Mexico Public Regulation Commission issued a
11 Certificate of Incorporation of Prestige Towing & Recovery, Inc. (hereinafter "Prestige 2011").
12 **[Department Ex. C]**

13 43. In contrast to the Articles of Incorporation for Prestige 1997, the Articles of
14 Incorporation for Prestige 2011 did not identify Mr. Elauterio Vigil as a corporate officer or as
15 an incorporator. **[Direct Examination of Ms. Lori Vigil; Department Ex. C]**

16 44. On or about April 12, 2012, Mr. Gabriel Vigil signed a 2009 PTE (New Mexico
17 Income Information Return for Pass-Through Entities), presumably for Prestige 2011, although
18 the periods subject of that return preceded Prestige 2011 by more than two years. **[Direct**
19 **Examination of Ms. Lori Vigil; Department Ex. D-014]**

20 45. On or about April 12, 2012, Mr. Gabriel Vigil signed a 2010 PTE (New Mexico
21 Income Information Return for Pass-Through Entities) presumably for Prestige 2011, although
22 the periods subject of that return preceded Prestige 2011 by more than a year. **[Direct**
23 **Examination of Ms. Lori Vigil; Department Ex. D-016]**

1 46. On or about March 4, 2013, Mr. Bard Heroy prepared a 2011 PTE (New Mexico
2 Income Information Return for Pass-Through Entities) presumably for Prestige 2011, although it
3 would not be incorporated until September 21st of that year. The 2011 PTE was unsigned.

4 **[Direct Examination of Ms. Lori Vigil; Department Ex. D-017 – D-018]**

5 47. Prestige 2011 is not presently in business and its Certificate of Incorporation was
6 revoked on or about June 14, 2018. **[Direct Examination of Ms. Lori Vigil; Taxpayer Ex. 6]**

7 48. On November 3, 2017, the Administrative Hearings Office entered Decision &
8 Order No. 17-46 which concluded that Platinum Performance, LLC was a successor in business
9 to Prestige Towing & Recovery, Inc. For the purpose of that protest, the parties attributed no
10 significance to the fact that Prestige 1997 was revoked in 2007 and re-incorporated as Prestige
11 2011 in 2011. **[Administrative Notice]**

12 49. Platinum Performance, LLC has assumed tax obligations of Prestige Towing &
13 Recovery, Inc. in the amount of \$297,082.77, and is under order of the U.S. Bankruptcy Court to
14 remit payment to the Department, a secured creditor, in monthly installments. **[Direct**
15 **Examination of Mr. Gabriel Vigil; Taxpayer Ex. 13]**

16 50. Mr. Gabriel M. Vigil is managing member of Platinum Performance, LLC.
17 **[Administrative Notice (D&O No. 17-46)]**

18 51. The order of the U.S. Bankruptcy Court to remit payment to the Department does
19 not release third-party debtors from liability nor does it prohibit the Department from seeking
20 payment from such parties. **[Taxpayer Ex. 13]**

21 52. The amount for which Platinum Performance, LLC is obligated represents
22 principal tax due, and excludes any amounts attributable to penalty or interest. **[Direct**
23 **Examination of Ms. Garcia]**

1 53. On March 14, 2018, the Department issued a Notice of Assessment of Taxes and
2 Demand for Payment to Mr. Gabriel M. Vigil, for \$187,208.69 in tax, \$93,609.41 in penalty, and
3 \$52,206.93 in interest for a total assessment in the amount of \$333,025.03 for the periods
4 between January 31, 2008 and September 30, 2011. The assessment references CRS No. 02-
5 358012-00-7. **[Administrative File]**

6 54. On March 14, 2018, the Department issued a Notice of Assessment of Taxes and
7 Demand for Payment to Mr. Elauterio Vigil, for \$187,208.69 in tax, \$93,609.41 in penalty, and
8 \$52,206.93 in interest for a total assessment in the amount of \$333,025.03 for the periods
9 between January 31, 2008 and September 30, 2011. The assessment references CRS No. 02-
10 358012-00-7. **[Administrative File]**

11 55. Neither assessment contains a letter identification number. **[Administrative File]**

12 56. Both assessments identically stated that the Department “does not recognize
13 PRESTIGE TOWING RECOVERY INC [sic] as a legal entity. The Department has determined
14 that you are personally liable for the tax debt because your business has failed to comply with the
15 registration requirements of the Secretary of State for corporations.” **[Administrative File]**

16 57. Taxpayers filed Formal Protests on May 30, 2018 through their shared counsel of
17 record. **[Administrative File]**

18 58. The Department acknowledged both protests on June 13, 2018. Neither
19 acknowledgement contains a letter identification number. **[Administrative File]**

20 59. On July 30, 2018, the Department filed a Hearing Request in which it requested a
21 hearing on the merits of Taxpayers’ protest. **[Administrative File]**

1 60. On July 30, 2018, the Administrative Hearings Office entered a Notice of
2 Administrative Hearing which set both matters for hearing on August 28, 2018. **[Administrative**
3 **File]**

4 61. On August 8, 2018, Taxpayers filed a Motion for Continuance. **[Administrative**
5 **File]**

6 62. On August 13, 2018, the Administrative Hearings Office entered an Order
7 Converting Merits Hearing to Telephonic Scheduling Hearing. **[Administrative File]**

8 63. A scheduling hearing occurred on August 28, 2018 at which time Taxpayers did
9 not object that conducting that hearing would satisfy the 90-day hearing requirement. The
10 Department did not appear for the hearing and for that reason, also did not object.

11 **[Administrative File]**

12 64. On November 21, 2018, the Department, by and through its counsel, certified that
13 it served Department's Responses to Taxpayer's First Request for Production of Documents.

14 **[Administrative File]**

15 65. On December 3, 2018, Taxpayers filed a Motion for Extension of Time to File
16 Motions. The Department opposed the motion by email. **[Administrative File]**

17 66. In addition to the Motion for Extension of Time to File Motions, Taxpayers also
18 filed the following on December 3, 2018:

19 a. Motion to Vacate Hearing Date Pending Determination in Declaratory Judgment
20 Action;

21 b. Motion to Dismiss the Assessment Herein as a Matter of Law on the Basis of Non-
22 Timely Assessment;

23 c. First Amended Motion for Extension of Time to File Motions;

1 d. First Amended Motion to Vacate Hearing Date Pending Determination in Declaratory
2 Judgment Action.

3 **[Administrative File]**

4 67. On December 7, 2018, the Department filed Department's Response to
5 Taxpayer's Motion for Extension of Time to File Motions and First Amended Motion for
6 Extension of Time to File Motions. **[Administrative File]**

7 68. On December 11, 2018, Taxpayers filed their Withdrawal of First Amended
8 Motion for Extension of Time to File Motions and First Amended Motion to Vacate.

9 **[Administrative File]**

10 69. On December 18, 2018, the Department filed Department's Response to
11 Taxpayer's Motion to Dismiss the Assessment as a Matter of Law on the Basis of Non-Timely
12 Assessment. **[Administrative File]**

13 70. On December 18, 2018, the Department filed Department's Response to
14 Taxpayer's Motion to Vacate Hearing Date Pending Determination in Declaratory Judgment
15 Action and First Amended Motion to Vacate Hearing Date Pending Determination in
16 Declaratory Action. **[Administrative File]**

17 71. On January 2, 2019, the Department filed Department's Prehearing Statement.

18 **[Administrative File]**

19 72. On January 2, 2019, Taxpayers filed Protestants' Prehearing Statement.

20 **[Administrative File]**

21 73. On January 7, 2019, the Administrative Hearings Office entered an Order
22 Denying Motion to Dismiss, or in the Alternative, Motion for Summary Judgment.

23 **[Administrative File]**

1 74. On January 24, 2019, the Administrative Hearings Office filed an Order
2 Requiring Motion and Response in Reference to Dispute Regarding Attachment to Taxpayer
3 Exhibit 13. **[Administrative File]**

4 75. On February 1, 2019, Taxpayers filed Motion to File Exhibit 13 with Plan of
5 Reorganization Attached and a Motion for Date Certain to File Closing Arguments.
6 **[Administrative File]**

7 76. On February 8, 2019, the Department filed Department’s Response Opposing
8 Taxpayer’s Motion to File Additional Material Attached to Exhibit 13. **[Administrative File]**

9 77. On February 19, 2019, the Administrative Hearings Office entered an Order
10 Denying Motion to File Exhibit 13 with Plan of Reorganization Attached and Setting Deadline
11 for Final Written Submissions. **[Administrative File]**

12 78. On February 22, 2019, Taxpayers filed a Submission of Exhibits 13.A, 13.B, and
13 13.C Per February 13, 2019 Order. **[Administrative File]**

14 79. On February 22, 2019, the Department filed Department’s Request for Order
15 Striking Taxpayer’s Submission of Exhibits 13.A, 13.B, and 13.C for Filing. **[Administrative**
16 **File]**

17 80. On March 1, 2019, the Department filed its Closing Argument. **[Administrative**
18 **File]**

19 81. On March 1, 2019, Taxpayers filed Protestants’ Final Summary. **[Administrative**
20 **File]**

21 82. On March 6, 2019, the Department filed a Notice of Errata. **[Administrative File]**

1 83. Taxpayers and Prestige 1997 did not file accurate returns reporting their gross
2 receipts or make associated payments for any tax due during the relevant periods of time. **[Direct**

3 **Examination of Ms. Garcia]**

4 84. Taxpayers, Prestige 1997, or Prestige 2011 engaged in business while not filing
5 tax returns coupled with the knowledge that the business was subject to tax, as exemplified by
6 prior reporting and payment history, particularly as noted from 2000 through 2004. **[Department**

7 **Ex. A-009]**

8 85. Taxpayers, Prestige 1997, or Prestige 2011 engaged in business while not filing
9 tax returns coupled with the knowledge that the business was subject to tax, as exemplified by a
10 review of invoices demonstrating that tax had been passed on to customers, yet never reported
11 nor remitted to the Department. **[Department Ex. A-015]**

12 86. Tax payments made by Prestige's successor in business, Platinum Performance
13 will reduce the amounts assertedly due from Taxpayers. **[Direct Examination of Ms. Garcia]**

14 **DISCUSSION**

15 The primary issue in dispute in this protest is whether or not any personal liability may be
16 attributed jointly and severally to Mr. Gabriel Vigil and Mr. Elauterio Vigil by virtue of their
17 association with Prestige 1997 and Prestige 2011.

18 The starting point in this protest is to recognize that the assessments at issue relate to the
19 tax periods of January 31, 2008 through September 30, 2011, but were not assessed to
20 Taxpayers, in their personal capacities, until March 14, 2018. Accordingly, the threshold issue
21 that will be considered is whether the assessments are barred by the statute of limitations on
22 assessments.

1 Under NMSA 1978, Section 7-1-17 (C) (2007), the assessments issued in this case are
2 presumed correct. Consequently, Taxpayers have the burden to overcome the assessments. *See*
3 *Archuleta v. O'Cheskey*, 1972-NMCA-165, ¶11, 84 N.M. 428. Unless otherwise specified, for the
4 purposes of the Tax Administration Act, “tax” is defined to include interest and civil penalty. *See*
5 NMSA 1978, §7-1-3 (X) (2013). Under Regulation 3.1.6.13 NMAC, the presumption of
6 correctness under Section 7-1-17 (C) extends to the Department’s assessment of penalty and
7 interest. *See Chevron U.S.A., Inc. v. State ex rel. Dep't of Taxation & Revenue*, 2006-NMCA-50,
8 ¶16, 139 N.M. 498, 503 (agency regulations interpreting a statute are presumed proper and are to be
9 given substantial weight). Accordingly, it is Taxpayers’ burden to present some countervailing
10 evidence or legal argument to show that they are entitled to an abatement, in full or in part, of the
11 assessment issued in the protest. *See N.M. Taxation & Revenue Dep't v. Casias Trucking*, 2014-
12 NMCA-099, ¶8. When a taxpayer presents sufficient evidence to rebut the presumption, the
13 burden shifts to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M.*
14 *Taxation & Revenue Dep't*, 2003-NMCA-21, ¶13, 133 N.M. 217.

15 **Statute of Limitations on Assessments**

16 It was undisputed that neither Prestige 1997 nor Taxpayers reported or paid gross receipts
17 taxes in the periods subject of their protests. This would suggest that the applicable statute of
18 limitations on assessments should be seven years pursuant to NMSA 1978, Section 7-1-18 (C)
19 which provides “In case of the failure by a taxpayer to complete and file any required return, the
20 tax relating to the period for which the return was required may be assessed at any time within
21 seven years from the end of the calendar year in which the tax was due[.]”

22 Should this section be determined applicable, then the deadlines to assess Taxpayers in
23 their individual capacities would have been: December 31, 2015 for any tax due in 2008;

1 December 31, 2016 for any tax due in 2009; December 31, 2017 for any tax due in 2010; and
2 December 31, 2018 for any tax due in 2011. Meanwhile, the assessments in dispute in this
3 protest were issued on March 14, 2018. Consequently, in the event the seven-year statute of
4 limitations applies, then the assessments can only be timely as to tax liabilities that were due in
5 2011.

6 However, the Department argues that the assessments are timely as to all periods because
7 the applicable period should be ten years instead of seven. It relies on NMSA 1978, Section 7-1-
8 18 (B) which provides “In case of a false or fraudulent return made by a taxpayer with intent to
9 evade tax, the amount thereof may be assessed at any time within ten years from the end of the
10 calendar year in which the tax was due[.]” Therefore, should the ten-year limitation apply, the
11 deadline to assess any tax that would have been due in 2008 would be December 31, 2018,
12 meaning that the assessments with regard for all periods in dispute would be timely.

13 Given the definitions associated with the term, “intent to evade tax,” the Hearing Officer
14 is persuaded that the applicable statute of limitations is ten years, instead of the seven years, as
15 claimed by Taxpayers.

16 The Department has defined the term “willful attempt to evade or defeat” as a “conscious
17 awareness of the obligation to pay taxes coupled with either a reckless disregard for, or gross
18 negligence with respect to, whether the tax is paid.” See Regulation 3.1.11.18 (A) NMAC.

19 Regulation 3.1.11.18 (B) (2) NMAC goes on to explain that a “willful attempt to evade or
20 defeat” may include “engaging in business while not filing tax returns coupled with the
21 knowledge that the business is subject to tax[.]” The evidence demonstrates that this is precisely
22 what occurred in the present case.

1 Prestige 1997 and Taxpayers knew that their business activities were subject to gross
2 receipts tax. The auditor noted, and Taxpayers did not dispute, that taxes were regularly charged
3 and collected on its invoices. This demonstrates knowledge that the business' activities were
4 subject to tax. Yet, gross receipts were not reported, and amounts of money collected from
5 customers which were attributable to taxes were never actually remitted to the state.

6 The auditor further noted, and Taxpayers also did not dispute, that Prestige 1997 had
7 reported and paid taxes over substantial periods of time prior to the periods now in dispute,
8 establishing the fact that Taxpayer had prior knowledge of its gross receipts obligations, as well
9 as knowledge of the procedure utilized to report gross receipts and pay associated taxes. In fact,
10 on some occasions, gross receipts were occasionally reported as zero, representing an affirmative
11 statement that was inconsistent with its actual receipts.

12 Taxpayers argued “[i]t is clear that the tax to be evaded is the tax relevant to the false or
13 fraudulent return. In this case, that would be the corporate income taxes.” The Hearing Officer
14 does not agree. The false or fraudulent returns permitting the limitation on assessments to extend
15 to ten years are the Combined Reporting System (“CRS”) returns, specifically that portion of the
16 CRS returns dedicated to *gross receipts tax*. The corporate income tax returns referenced by
17 Taxpayers demonstrated various inconsistencies with the way that Prestige 1997 and Taxpayers
18 were characterizing their business activities, and further exemplified the lackadaisical manner in
19 which Prestige 1997 viewed its reporting and payment obligations.

20 Considering the totality of the circumstances, as established by the evidence, the Hearing
21 Officer is not necessarily persuaded that Taxpayers, whether individually or through Prestige
22 1997, ever acted with *malice* while disregarding their tax reporting and payment obligations.
23 However, Taxpayers, whether in their individual capacities or through Prestige 1997, did

1 intentionally and deliberately fail to act. *See* NMSA 1978, Section 7-1-73 (H) (“ ‘willfully’
2 means intentionally, deliberately or purposely, but not necessarily maliciously.”)

3 Of course, Section 7-1-18 (B) does not require a “willful” intent to evade tax, but this
4 distinction with the referenced definitions is inconsequential where the Hearing Officer finds that
5 the evidence would satisfy what might be deemed a higher willfulness standard, as opposed to a
6 lower standard not requiring “willfulness.”

7 The Hearing Officer does not disregard the facts that Department Ex. A-010 – A-015
8 makes no reference to the application of Section 7-1-18 (B). However, that provides no basis for
9 the Hearing Officer to now disregard its application to the evidence in the record.

10 The Department established that the applicable limitation on assessments in this protest is
11 ten years pursuant to Section 7-1-18 (B). Therefore, the assessments subject of this protest are
12 timely as to all relevant periods.

13 **Consequence of Corporate Revocation**

14 Having determined that the limitation on assessments under the circumstances
15 demonstrated by the evidence is 10 years, the critical inquiry shifts to the identity of the taxpayer
16 in the periods from August 7, 2007 to September 21, 2011. These dates bookend the period of
17 time in which the Department asserts that Taxpayers are jointly and severally liable in their
18 personal capacities, instead of Prestige 1997 and Prestige 2011.

19 It is undisputed that Prestige 1997’s Certificate of Incorporation was cancelled effective
20 August 7, 2007. Yet, Taxpayers assert that the cancellation was erroneous for a variety of
21 reasons. The Hearing Officer’s function is not to determine whether or not the cancellation of
22 Prestige 1997’s Certificate of Incorporation was lawful or not. The Public Regulation

1 Commission (“PRC”) determined that there was cause to cancel the corporate certificate, which
2 Prestige 1997 did not ever contest. *See* NMSA 1978, Section 53-5-7 (2003).

3 The Hearing Officer will not second-guess the PRC in an area of law for which it was
4 vested with the authority to implement and enforce. Moreover, even if the Hearing Officer were
5 to agree that the cancellation of the Certificate of Incorporation was erroneous, it is uncertain
6 how that might change the outcome of this protest. The Certificate of Incorporation was still
7 cancelled, and the Hearing Officer is without authority to rectify any error that may have been
8 committed by another State agency.

9 However, based on the evidence in the record, the Hearing Officer actually perceives no
10 fault with the PRC. Ms. Lori Vigil testified that she was responsible for submitting the relevant
11 corporate filings to the PRC, particularly for tax years ending December 31, 2004 and December
12 31, 2006. On April 5, 2007, the PRC returned the report for tax year ending December 31, 2006,
13 explaining that “Returned is your 2006 – FYE Corporate Report and Check number 6585[.]” The
14 correspondence went on to explain several deficiencies noted on the report. Ms. Vigil testified
15 that she made the required corrections and faxed the report back to the PRC. She also testified
16 that she did not re-submit the payment, presuming that the check was still with the PRC.

17 When the PRC made no further contact, Ms. Vigil assumed that the deficiencies had been
18 adequately addressed and gave the matter no further attention, at least until 2011 when she said
19 she learned that the corporate certificate had been cancelled, reportedly due to the failure to
20 respond to the PRC’s April 5, 2007 correspondence. However, Ms. Vigil’s testimony is
21 contradicted by the correspondence from the PRC and is not credible.

22 The April 5, 2007 correspondence clearly explained “Returned is your 2006 – FYE
23 Corporate Report *and Check number 6585[.]*” (Emphasis Added) Yet, Ms. Vigil testified that the

1 report was easily corrected and faxed back to the PRC, and that she did not need to resubmit
2 payment because the PRC retained possession of the check. In contradiction, the correspondence
3 clearly specifies that the check was returned.

4 Providing Ms. Vigil the benefit of the doubt, the Hearing Officer also considered the
5 possibility that the PRC retained the check despite the fact that the cover letter states otherwise,
6 in which case it would have been reasonable for Ms. Vigil to make some effort, at some point,
7 between 2011 and the present time to determine whether the check ever cleared the bank. The
8 letter from the PRC even provides a check number which would simplify such inquiry, but Ms.
9 Vigil could not recall if she had ever done so, which the Hearing Officer finds questionable. A
10 reasonable person in Ms. Vigil's position would make some inquiry regarding the status of the
11 check, and most importantly, retain or recall whatever information the inquiry revealed.

12 Taxpayers also assert fault with the PRC for allegedly mailing the Certificate of
13 Cancellation to its street address in lieu of its mailing address, explaining that Prestige 1997
14 never had the opportunity to contest the cancellation because it never received notice. Taxpayers
15 place substantial significance on online public information which shows, as of January 15, 2019,
16 that Prestige 1997's mailing address was listed as a physical address where it did not, and could
17 not, receive mail.

18 The Hearing Officer finds this argument unpersuasive. Correspondence from the PRC in
19 reference to deficiencies noted with Prestige 1997's corporate reports, as well as correspondence
20 providing notice of the cancellation of its corporate certificate, were clearly addressed to Prestige
21 1997's mailing address, not its physical address. *See* Department Ex. B-007 – B-008. Online
22 information from 2019, nearly 12 years after the relevant events, is significantly less reliable for
23 establishing where communications were mailed, than referring to the face of the actual letters.

1 With concern for this issue, Taxpayer proffered Taxpayer Exhibits 14 and 15 to which
2 the Department objected. The Hearing Officer reserved ruling on the objection. Taxpayer Exhibit
3 14 is an affidavit from an employee of the Secretary of State's office in which she clearly
4 explains that she has no personal knowledge regarding any matter specific to this protest but
5 goes on to discuss PRC operations in a general manner. Taxpayer Exhibit 15 is an email in which
6 the same individual responds to questions from counsel for Taxpayers, and once again explains
7 that she has no personal knowledge of the issue subject of this protest but attempts to discuss
8 PRC operations in a general manner. The Hearing Officer admits Taxpayer Exhibits 14 and 15
9 for the purpose of establishing some minimal amount of insight into PRC operations, but
10 ultimately affords the exhibits no weight with regard to any material facts due to the witness'
11 admitted lack of personal knowledge.

12 Although significant disagreement exists over the basis and procedure employed in
13 cancelling Prestige 1997's corporate certificate, the certificate was nevertheless, still cancelled
14 effective August 7, 2007, giving rise to the question of what, if any personal liability can be
15 attributed to its officers, directors, or shareholders.

16 Neither party cited case law in which a New Mexico Court discussed the consequences of
17 a corporate cancellation. The law in effect at the relevant time provided that "[s]ixty days after
18 written notice of failure to file a report has been mailed to the corporation's mailing address as
19 shown in the last corporate report filed with the public regulation commission, the corporation
20 shall have its certificate of incorporation canceled by the commission without further
21 proceedings, unless the report is filed and all fees and penalties are paid within that sixty-day
22 period." *See* NMSA 1978, Section 53-5-7 (A).

1 Thereafter, “[a] domestic corporation whose certificate of incorporation has been
2 canceled ... shall be stricken from the files of the commission without further proceedings.” *See*
3 NMSA 1978, Section 53-5-7.1. Other than what essentially amounts to a purge of the cancelled
4 corporation’s records, neither the Corporate Reports Act nor the Business Corporation Act detail
5 the consequence of a cancellation upon the protections that are customarily afforded for those
6 engaging in business through a corporate entity.

7 A survey of law from other jurisdictions reveals that some statutes prescribing forfeiture
8 of a corporate charter for a failure to file annual reports have been construed to automatically
9 effect a dissolution of a corporation without judicial action. *See e.g. Leibson v. Henry*, 204
10 S.W.2d 310 (1947). Others, however, do not effectively dissolve the corporation but render it
11 incompetent to transact business while in default of its statutory obligations. *See e.g. Micciche v.*
12 *Billings*, 727 P.2d 367 (Colo. 1986).

13 Those which prescribe forfeiture of the corporate charter have adhered to the general rule
14 that “upon the corporation’s death, those officers, directors or shareholders who continue to
15 engage in corporate business other than winding up the affairs of the company will be held
16 personally liable for such activity.” *See Chatman v. Day*, 455 N.E.2d 672 (Ohio App. 1982)
17 (*citing 16A Fletcher, Cyclopedia of Private Corporations* (Rev. Ed. 1979) 293, Dissolution and
18 Winding Up, Section 8117).

19 Of course, the court in *Chatman* was also discussing this issue in relation to its own
20 statute, which varies from our own. The statute relevant to that discussion provided “[w]hen a
21 corporation is dissolved voluntarily or when the articles of a corporation have been canceled or
22 when the period of existence of the corporation specified in its articles has expired, the
23 corporation shall cease to carry on business and shall do only such acts as are required to wind

1 up its affairs, but for such purpose it shall continue as a corporation.” *See Chatman v. Day*, 455
2 N.E.2d 672.

3 In reviewing the statute applicable to this issue, it is obvious that the Legislature intended
4 a similar result when it essentially granted authority for all records of the corporation to be
5 stricken. Had the intention been to merely suspend corporate operations, then striking a
6 corporation’s records would have been absurd in light of the possibility that the corporation
7 might regain its good standing and proceed with conducting business. Instead, striking the
8 records of the corporation is fundamentally equivalent to corporate disembowelment providing
9 no opportunity to resume business under that corporation.

10 This observation is also consistent with the view expressed by the New Mexico Court of
11 Appeals, which has simply stated “that one who holds himself out as a corporation is personally
12 liable for his acts if, in fact, there is no corporation.” *See Smith v. Halliburton Co.*, 1994-NMCA-
13 055, ¶29, 118 N.M. 179, 879 P.2d 1198. The Court made this statement in relation to NMSA
14 1978, Section 53-18-9 which provides that “[a]ll persons who assume to act as a corporation
15 without authority to do so are jointly and severally liable for all debts and liabilities incurred or
16 arising as a result thereof.” The term “all debt and liabilities” would include the tax liability
17 incurred from engaging in business in New Mexico without the benefit of state-recognized
18 corporate protection.

19 The Department suggested that the answer to the foregoing should be obvious: liability
20 from August 7, 2007 through September 21, 2011 should descend on Taxpayers in their personal
21 capacities. The Hearing Officer found no basis to deviate from that conclusion. The Hearing
22 Officer agrees that the general rule embodied in Section 53-18-9 should apply: upon a

1 corporation's cancellation, those officers, directors or shareholders who continue to engage in
2 business should be held personally liable for such activity.

3 Nevertheless, Taxpayers assert that the Department should be estopped from denying the
4 existence of the corporation based on the concept of "corporation by estoppel" and the U.S.
5 District Court case of *Navajo Tribe v. Bank of N.M.*, 556 F. Supp. 1, 3 (D.N.M. 1980) in which
6 Judge Juan Burciaga, citing the Supreme Court of Alaska in *Willis v. City of Valdez*, 546 P.2d
7 570, 574 (Alaska 1976), said:

8 "Corporation by estoppel" is actually a misnomer for the result of
9 applying the policy whereby private litigants may, by their
10 agreements, admissions, or conduct, place themselves in a position
11 where they will not be permitted to deny the fact of the existence of
12 a corporation. Because estoppel as a doctrine is concerned with the
13 acts of the parties, as opposed to the legality of the corporation itself,
14 we think the better rule is that the corporation by estoppel doctrine
15 may be employed even when the corporation has not achieved de
16 facto existence.

17 Taxpayers assert in their closing argument that "[t]he Department had every reason to
18 know at all times since August 7, 2007 that [Prestige 1997] had been formally revoked." *See*
19 *Protestants' Final Summary*, Page 26. Taxpayers go on to itemize all prior instances in which the
20 Department, could have, but did not raise the issue that Prestige 1997 ceased to exist in 2007,
21 including in the hearing regarding Platinum Performance, LLC, during various audit tasks, or at
22 any other time prior to the issuance of the assessments at issue in this protest.

23 The consequence, according to Taxpayers, is that because the Department should have
24 known from a review of public records that Prestige 1997 had been cancelled in 2007, it cannot
25 presently deny the existence of the corporation.

26 The Hearing Officer is not persuaded. The facts presented in *Navajo Tribe* differ
27 significantly from the facts at issue herein, and with all due respect to the United States District

1 Court, it was considering issues exclusively within the jurisdiction of the federal courts, and
2 made no reference to the statutes applicable under state law in the present case.

3 Moreover, Taxpayers’ claim, that the Department should not be entitled to benefit from
4 ignorance of information that is publicly available, is unsupported by law, especially when
5 Section 53-18-9 provides no exception for constructive notice on the state or any other party. In
6 fact, penalizing the Department for failing to recognize at some earlier time, facts that have
7 actually been known to Taxpayers at least since 2011, if not as early as 2007, would be absurd,
8 and would unjustly shift the consequences of Taxpayers’ actions or inactions in 2007, to the
9 State of New Mexico in 2019, a contradiction of Section 53-18-9.

10 This is not the scenario contemplated by the legislature, nor considered by U.S. District
11 Court Judge Burciaga in *Navajo Tribe*.

12 Pursuant to Section 53-18-9, persons who assume to act as a corporation without
13 authority to do so are jointly and severally liable for all debts and liabilities incurred or arising as
14 a result. Taxpayers have not established that they are immune under any applicable provision of
15 New Mexico law.

16 **Claim and Issue Preclusion**

17 Taxpayers argue that the Department should be precluded by the doctrines of collateral
18 estoppel and res judicata from re-litigating claims and issues that were previously decided in
19 *Platinum Performance, LLC*.

20 The Hearing Officer will begin with the potential application of collateral estoppel which
21 “fosters judicial economy by preventing the relitigation of ‘ultimate facts or issues actually and
22 necessarily decided in a prior suit.’” *See Shovelin v. Central N.M. Elec. Coop. Inc.*, 1993-NMSC-

1 015, ¶10, 115 N.M. 293, 850 P.2d 996, quoting *International Paper Co. v Farrar*, 1985-NMSC-
2 046, 102 N.M. 739, 741, 700 P.2d 642, 644.

3 The Supreme Court in *Shovelin* explained:

4 [b]efore collateral estoppel is applied to preclude litigation of an
5 issue, however, the moving party must demonstrate that (1) the
6 party to be estopped was a party to the prior proceeding, (2) the
7 cause of action in the case presently before the court is different
8 from the cause of action in the prior adjudication, (3) the issue was
9 actually litigated in the prior adjudication, and (4) the issue was
10 necessarily determined in the prior litigation. *Silva v. State*, 106
11 N.M. 472, 474-76, 745 P.2d 380, 382-84 (1987). If the movant
12 introduces sufficient evidence to meet all elements of this test, the
13 trial court must then determine whether the party against whom
14 estoppel is asserted had a full and fair opportunity to litigate the
15 issue in the prior litigation. *Id.* at 474, 745 P.2d at 382. This issue
16 is within the competence of the trial court, and we review the trial
17 court’s determination for an abuse of discretion. *See id.* at 476, 745
18 P.2d at 384.

19 However, *Antillon v. N.M. State Highway Dept.*, 1991-NMCA-093, 113 N.M. 2, 820 P.2d
20 436, explains that “ordinarily the doctrine of collateral estoppel should not bar a state agency
21 from arguing a point of law on the ground that it lost on that issue in prior litigation with a
22 different party.” *Id.* ¶ 5. *See also Edwards v. Bd. of County Comm. of the County of Bernalillo*,
23 *N.M.*, 1994-NMCA-160, 119 N.M. 114, 888 P.2d 996 (“We hold that the trial court correctly
24 determined that collateral estoppel did not apply to prevent the County from litigating the legal
25 issue[.]”

26 Setting aside, at least for the moment, the fact that collateral estoppel may not apply to
27 state agencies, the Hearing Officer compares the facts at hand to the elements required to
28 establish the application of collateral estoppel. Most significant is the fact that Taxpayers have
29 indirectly concurred that issue at bar in this protest, particularly the effect of Prestige 1997’s
30 corporate cancellation, was not actually litigated in the prior adjudication. The Hearing Officer
31 bases this conclusion on the fact that Taxpayers asserted fault by the Department for being

1 ignorant of the detail that Prestige 1997’s corporate certificate was cancelled in 2007. If it is true
2 that the Department was truly ignorant of this fact, at least until March of 2018 when it assessed
3 Taxpayers in their individual capacity, then it would have been impossible for the issue to have
4 been “actually litigated” in 2017 when this office considered the protest of *Platinum*
5 *Performance, LLC*. Moreover, there is nothing in reviewing the Decision and Order to suggest
6 that there was any consideration by the Hearing Officer in *Platinum Performance, LLC*, much
7 less a determination, regarding the effect of the cancellation of Prestige 1997’s corporate
8 certificate in 2007.

9 For those reasons alone, not to mention the fact that collateral estoppel is not generally
10 applicable against the State, the Department would not be estopped from litigating issues now
11 before the Hearing Officer.

12 Meanwhile, the “underlying principle behind res judicata is to ‘relieve parties of the cost
13 and vexation of multiple lawsuits, conserve judicial resources, and by preventing inconsistent
14 decisions, encourage reliance on adjudication.’” *See Three Rivers Land Co. v. Maddoux*, 1982-
15 NMSC-111, ¶21, 98 N.M. 690, 652 P.2d 240 *quoting Allen v. McCurry*, 449 U.S. 90, 94, 101
16 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). “Res judicata applies when four elements are met: (1)
17 identity of parties or privies, (2) identity of capacity or character of persons for or against whom
18 the claim is made, (3) same cause of action, and (4) same subject matter.” *See Three Rivers*,
19 1982-NMSC-111, ¶21.

20 Although the issues addressed in *Platinum Performance, LLC* may have had their origin
21 in the existence and operation of Prestige 1997, the issue at the present time does not concern the
22 same subject matter. The issue in *Platinum Performance, LLC* was whether it was a successor in
23 business. The issue at hand concerns the personal liability of Taxpayers for a period of time

1 during which Prestige 1997 did not legally exist, but in which its business was carried on as
2 though it did.

3 At this point, the Hearing Officer must also recognize that the issues of collateral
4 estoppel and res judicata are judicially-created doctrines, and whether to apply them is a judicial
5 determination in the absence of a statute to the contrary. *See e.g. Shovelin* at ¶14.

6 However, the Supreme Court has recognized that although administrative bodies, such as
7 the Administrative Hearings Office, may exercise “quasi-judicial powers,” application of
8 equitable doctrines might extend beyond the reach of the administrative body’s limited powers.
9 *See AA Oilfield Service v. New Mexico State Corp. Comm’n*, 1994-NMSC-085, 118 N.M. 273,
10 279, 881 P.2d 18 (“authority to grant an equitable remedy depends on whether such authority
11 may be fairly encompassed within the realm of ‘quasi-judicial powers.’ We do not believe that it
12 can.”)

13 Rather, an administrative body’s authority in equity is defined by the statute which
14 authorizes it to act. *See AA Oilfield*, 1994-NMSC-085. ¶18, *citing Continental Oil Co. v. Oil*
15 *Conservation Commission*, 1962-NMSC-062, 70 N.M. 310, 318, 373 P.2d 809, 814 (1962). In
16 the present matter, nothing in the Administrative Hearings Office Act or any other applicable
17 statute specifically grants this tribunal the authority to preclude the relitigation of issues or
18 claims pursuant to the doctrines of collateral estoppel or res judicata. *See NMSA 1978*, Section
19 7-1B-1 to – 9 (2015).

20 In contrast, the judiciary’s authority derives from Article IV, Section 13 of the
21 Constitution of the State of New Mexico. *See N.M. Const. Art. VI*, Section 13 (“The district
22 court shall have original jurisdiction in all matters and causes not excepted in this
23 constitution...and supervisory control over the same[.]”); *See also* Rule 1-001 (A), NMRA

1 (“These rules govern the procedure in the district courts of New Mexico in all suits of a civil
2 nature whether cognizable as cases at law or in equity[.]”)

3 Since the legislature has not specifically conferred upon the Administrative Hearings
4 Office powers in equity, the Hearing Officer is not inclined to test the limits of the court’s
5 remarks in *AA Oilfield* in which it expressed hesitancy concerning the authority of an
6 administrative agency to grant equitable relief. The Department’s assessments are not precluded
7 by the doctrines of collateral estoppel or res judicata.

8 **Effect of Platinum Performance, LLC Bankruptcy**

9 Taxpayer asserts that the Department should be precluded from seeking payment from
10 Taxpayers because Platinum Performance, LLC has assumed liability for payment by virtue of a
11 Stipulated and Default Order Approving Disclosure Statement and Confirming Debtor Platinum
12 Performance, LLC’s Plan of Reorganization Dated September 25, 2018 (Taxpayer Exhibit 13B).
13 The same was filed in the United States Bankruptcy Court for the District of New Mexico on
14 January 18, 2019 in Case No. 11-17-13064-TA.

15 Although it is accurate that the entity in bankruptcy has stipulated to the payment of a
16 portion of the Department’s total claim, that does not also establish that the Department should
17 be precluded from seeking payment from other potentially liable sources. The stipulation upon
18 which Taxpayers rely does not expressly release any third parties, specifically Taxpayers, from
19 liability, nor do Taxpayers direct the Hearing Officer to any law that would command such
20 result.

21 To the extent Taxpayers are concerned about the Department recovering amounts
22 exceeding the outstanding liability, stemming from simultaneous collection activities against
23 Taxpayers and Platinum Performance, LLC, Ms. Garcia explained that any payments by one

1 would be credited against the liability of the other. But most significantly, Mr. Gabriel Vigil is
2 also managing member of Platinum Performance, LLC and is uniquely positioned to have
3 knowledge of all payments made by himself or his father in their personal capacities as well as
4 payments made by Platinum Performance, LLC. This scenario eliminates any concern for Mr.
5 Vigil or his father making payments without knowledge that other payments are simultaneously
6 being credited from other, unknown sources.

7 The Department has an obligation under the law to assess any taxpayer it determines to
8 be liable for taxes in excess of \$25. *See* NMSA 1978, Section 7-1-17. Taxpayer fails to cite any
9 legal authority for the proposition that its obligation to assess, and subsequently collect such
10 liability may be disregarded under any circumstances present in this matter.

11 Taxpayers' protest should be denied.

12 CONCLUSIONS OF LAW

13 A. Taxpayers filed timely, written protests of the Department's assessments and
14 jurisdiction lies over the parties and the subject matter of the protests.

15 B. The hearing was timely set and held under NMSA 1978, Section 7-1B-8 (2015).

16 C. The Department's assessments were timely because they resulted from a false or
17 fraudulent return made by taxpayers with intent to evade tax, which provides that the Department
18 may assess the liability at any time within ten years from the end of the calendar year in which
19 the tax was due. *See* NMSA 1978, Section 7-1-18 (B).

20 D. Taxpayers are personally liable under NMSA 1978, Section 53-18-9 which
21 provides that "[a]ll persons who assume to act as a corporation without authority to do so are
22 jointly and severally liable for all debts and liabilities incurred or arising as a result thereof." *See*

1 *also Smith v. Halliburton Co.*, 1994-NMCA-055, ¶29, 118 N.M. 179, 879 P.2d 1198 (one
2 holding himself out as a corporation is personally liable for his acts if there is no corporation).

3 For the foregoing reasons, the Taxpayer's protest **IS DENIED. IT IS ORDERED** that
4 Taxpayers be jointly and severally liable for any outstanding liability under the assessments subject
5 of the protest.

6 DATED: June 26, 2019

7 

8 Chris Romero
9 Hearing Officer
10 Administrative Hearings Office
11 P.O. Box 6400
12 Santa Fe, NM 87502
13

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.

13 **CERTIFICATE OF SERVICE**

14 On June 26, 2019, a copy of the foregoing Decision and Order was submitted to the parties
15 listed below in the following manner:

16 *First Class Mail*

Interdepartmental State Mail

17 INTENTIONALLY BLANK

18 _____
19 John Griego
20 Legal Assistant
21 Administrative Hearings Office
22 P.O. Box 6400
23 Santa Fe, NM 87502